NO. 13104

In the United States Court of Appeals for the Ninth Circuit

DAVID BERNSTEIN, trading as AFFILIATED CREDIT EXCHANGE and BUSINESS RESEARCH, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On Petition to Review an Order of the Federal Trade Commission

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

I

STATEMENT OF THE CASE

This is an administrative law proceeding arising upon petition to review and set aside an order to cease and desist (R. 42-43) issued by the Federal Trade Commission, respondent, pursuant to a Commission complaint (R. 3-7) charging petitioner with engaging in unfair and deceptive acts and practices "in interstate commerce in violation of the Federal Trade Com-

mission Act." The proceeding below conforms to all the requirements of, and was in full and complete compliance with, the applicable provisions of the Federal Trade Commission Act and the Administrative Procedure Act.

In substance the charge was that in operating his collection agency petitioner falsely represented his business status for the purpose of obtaining information of a personal nature from alleged delinquent debtors which but for the false representation such debtors would not have supplied. There is neither a conflict in the evidence nor dispute as to the facts. The facts found by the Commission (Paragraph One-Six, Findings as to the Facts, R. 38-42) are based upon (1) admission answer (R. 13); (2) testimony of petitioner (R. 46-87); (3) Commission's Exhibits 1A-1B, 2A-2B, 3, 4, 5, 6 and 7 (R. 55-64); and Commission's Exhibits 7A-7B (R. 76-77); and (4) stipulation entered of record (R. 71-72). We might at this point call the Court's attention to the fact that in his brief (page 5) petitioner tells the Court that he does not question or challenge the findings of fact set forth in Paragraphs One through Six of the findings as to the fact (R. 38-42). The order to cease and desist is based upon these findings and these findings only. Petitioner does attempt to challenge, however, the conclusion made by the Commission (R. 42) that the admitted acts and practices constitute unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. We shall, therefore, as briefly as possible, summarize the admitted and unchallenged findings of fact made by the Commission.

Petitioner is an individual engaged in the business of operating in interstate commerce a collection agency under the name Affiliated Credit Exchange. He also uses for certain purposes the name Business Research. His principal office is in Los Angeles, California. He secures business by two methods: (1) listings in recognized license books and (2) through representatives or solicitors who travel in various states and solicit accounts for collection (R. 47-50).[1]

Petitioner furnishes the solicitors with assignment contract forms (Comm. Ex. 7A) and forms (Comm. Ex. 7B) for listing each account assigned (R. 63-70). These representatives or solicitors secure or obtain from various creditors, residing in California and in states other than the State of California, the assignment of accounts for collection to petitioner. These accounts are against debtors residing in the State of California and in states other than the State of California and are listed on the blank form or listing sheet (Comm. Ex. 7B) showing the name of the debtor, address, amount and nature of the debt and other pertinent information. This listing sheet is then attached to the contract of assignment (Comm. Ex. 7A). The creditor executes the contract assigning to petitioner for collection on a commission basis all of the accounts so listed. He delivers the contract to the solicitor. The solicitor mails the executed contract and

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[1] The record discloses that these solicitors are independent contractors. Their compensation is based upon the type of acounts which by their efforts are assigned to petitioner for collection by creditors residing in California and in states other than the State of California.

list of accounts to petitioner at his place of business in Los Angeles, California (R. 81-83).

Petitioner thus receives business from clients (creditors) residing in states other than the State of California. This business is against debtors similarly located. In the course of operating his collection agency in Los Angeles, California, petitioner receives money from debtors located in states other than the State of California and transmits money to and receives money from clients (creditors) located in states other than the State of California (R. 50; 68-69; 79).[2]

When petitioner receives an assignment of accounts from a creditor, the accounts are analyzed. If a debtor has not responded to the creditor or there is an indication that a debtor has moved, petitioner attempts to locate the debtor, using for this purpose a post card of the double-type variety; one card is addressed to the debtor, the return card is addressed to petitioner under the name Business Research, Washington, D. C. Petitioner mails these addressed cards in bulk to his agent in Washington, D. C. (R. 51-52; 54-56). This agent mails the cards to the individual debtors so that the cards will bear the Washington, D. C. postmark (R. 66). The cards thus go to addressees located in various states of the United States. The card addressed to the debtor has the following return address:

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[2] Petitioner testified that some debtors pay direct to his client. The client sends petitioner his commission. "It is a traffic back and forth" (R. 79).

"Return to

Business Research,
703 Albee Building,
Washington 5, D. C."

The message addressed to the debtor reads as follows:

Washington, D. C.

"To addressee:

To enable us to complete our records it is necessary that you furnish the information requested on the attached card.

Do this at once and mail to us.

Business Research
by D. Bernstein."

The attached card or reply part of the postal card addressed to "Business Research, 703 Albee Building, Washington 5, D. C.", is intended to be detached, filled out, signed and mailed by the debtor. The form to be filled out is as follows:

Subject .....
Subject's Address .....
Subject's Employer .....
Address .....
Monthly Salary ..... Does this include room, board or services? .....
Employed since (approximate date) .....
Own home? ..... Rent? ..... Own auto? .....
If Married, spouse's name .....
Spouse's employment, if any .....
Number of dependents .....
Your name .....

Along the right side of this return card appears a box of abbreviated figures and various numbers. This is similar in appearance to punch cards, commonly used for statistical purposes. (See Comm. Ex. 1A-1B, 2A-2B). When petitioner's agent in Washington, D. C. receives the "reply part of the postal card" the agent mails these cards to petitioner's place of business in Los Angeles, California (R. 66).

Petitioner does not conduct and is in no way connected with any business research bureau or office or in compiling business and labor statistics. Petitioner has no office in Washington, D. C. He merely employs an agent for the sole purpose of mailing from Washington, D. C. the double post cards to the debtors, and mailing to petitioner at his address in Los Angeles, California, the reply card when received in Washington, D. C. (R. 66-68).

Through the use of the name Business Research and the form and phraseology of the postal card petitioner falsely represented that he was engaged in conducting a business research bureau or office or in compiling business and labor statistics and that the information requested of debtors was for such purposes. The sole purpose for sending the postal cards was in connection with the operation of petitioner's business in the collection of delinquent accounts (R. 51; 54-56). The use of such post cards for such purposes has and has had the capacity and tendency to mislead and deceive persons into the erroneous and mistaken belief that petitioner was engaged in conducting a research bureau or office, or in compiling business and labor statistics. This induced the recipients of the cards to give infor-

mation to petitioner which otherwise they would not have supplied (R. 68). The sole purpose of the use of such subterfuge was to locate the debtors, get as much information as possible in order to make a recovery of money for the creditor who employed petitioner for that purpose (R. 65-66, 85). If petitioner had written to them in the name of the creditor or even in the name of Affiliated Credit Exchange the debtor would not have replied (R. 67).

Upon the basis of those facts the Commission concluded (R. 42) that petitioner had violated the Federal Trade Commission Act and ordered him in connection with operating his business of collecting debts in interstate commerce to cease and desist from:

1. Using the word "Business Research", or any other word or words of similar import, to designate, describe or refer to the respondent's business; or otherwise representing, directly or by implication, that the respondent is engaged in research in business or in other forms of research.

2. Representing directly or by implication, that the respondent's said business is other than that of collecting accounts or debts, or that the information sought by means of the respondent's devices is for any purpose other than for use in the collection of accounts or debts.

3. Representing, for the purpose of misleading debtors or others as to the respondent's place of business, that his business is located in Washington, D. C. or any place other than its actual location.

Petitioner thereafter filed his petition to review and set aside the Commission's order (R. 92-99) and filed his statement of points relied upon (R. 100-103).

II

QUESTION PRESENTED

We find petitioner's brief somewhat confusing and in some respects contradictory. We believe this to be due to petitioner's lack of familiarity with administrative procedure such as is here involved. Petitioner fails to distinguish between the initial decision handed down by the trial examiner (R. 26-32), the interlocutory decision handed down by the Commission on petitioner's appeal from the initial decision of the trial examiner (R. 34-36) and the ultimate and final determination of this case on its merits by the Commission (R. 37-43).[3]

In this connection we believe it would be of benefit to the Court if, at this stage of our brief, we briefly outlined the procedure covering matters of this nature before the Commission. Under the Commission's Rules of Practice the hearing examiner must make and file his initial decision within thirty days from the date of the order closing the case before him. This initial decision must include findings as to the facts, conclu-

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[3] The ultimate and final decision of the Commission on the merits is the only decision which under the Federal Trade Commission Act is subject to review. However, when exceptions to, and an appeal from, the decision or ruling of a hearing examiner is made, the Court, of course, under its review powers can examine the interlocutory decision rendered by the Commission to determine if error was committed; and, if so, if the error is of such a nature as to materially affect the Commission's findings as to the facts and its order to cease and desist.

sions, as well as an appropriate order. It must be served upon the parties. This decision becomes the decision of the Commission thirty days from such service unless prior thereto (1) an appeal is filed under the provisions of Rule XXIII, (2) the Commission by order stays the effective date of the initial decision, or (3) the Commission on its own initiative places the case on its review calendar. The appeal referred to in Rule XXIII must be filed within ten days after service of the initial decision.[4]

Bearing the above procedure in mind the confusion and the contradictions appearing in petitioner's brief and argument will become plainly apparent.

On December 20, 1950 an order was entered by the trial examiner closing this case before him (R. 23) and on the 22nd day of December, 1950, the trial examiner handed down his initial decision containing findings as to the facts, conclusion, and order to cease and desist (R. 26-32). This decision was served upon respondent (petitioner) on the 8th day of January, 1951 (R. 33). After the service of the initial decision upon him, petitioner complied with the provisions of Rule XXIII of the Commission's Rules of Practice and perfected his appeal from the initial decision of the trial examiner (R. 32-33). Briefly, the grounds relied upon by petitioner in his appeal were: (1) "The order does not determine whether respondent [petitioner] is engaged in interstate commerce" but assumes that he is; and (2) the order is based upon an erroneous finding that

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[4] See Rule XXII, Rule XXIII, Rule XXIV and Rule XXVI of the Commission's Rules of Practice published in the Federal Register under date of April 28, 1950.

petitioner "offers for sale, sale and distribution of a collection system". On February 9, 1951 petitioner filed with the Commission his brief in support of this appeal—no oral argument was requested. Thereafter on the 9th day of July, 1951, the Commission handed down two separate but related decisions. One was interlocutory and one final. The interlocutory decision was a ruling by the Commission on petitioner's appeal from the initial decision of the trial examiner. Since the order to cease and desist made no determination of facts either as to jurisdiction or otherwise, the Commission treated the ground set forth by petitioner under (1) of its appeal as an exception to the trial examiner's conclusion, from the fact found by him, that petitioner's acts and practices constituted acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act rather than an exception to the order of the Commission. The Commission being of the opinion that the facts as found by the trial examiner supported his conclusion, jurisdiction was established. Petitioner's appeal in this respect was denied. The Commission was of the further opinion that the trial examiner's order to cease and desist should have prohibited petitioner's practices when used in connection with the collection of debts and not (as it did) when used in connection with the sale of a collection system. The Commission sustained petitioner's appeal in this respect (R. 34-36).

The final decision handed down on the same date was the Commission's ultimate and final determination of this case on its merits. This decision contained the Commission's findings as to the facts, the Commission's

conclusion and the Commission's order to cease and desist (R. 37-43). In the preamble to its final decision the Commission declared (R. 38) that the findings as to the facts, the conclusion drawn therefrom and the order to cease and desist contained in its final decision was "to be in lieu of the findings as to the facts, conclusion, and order included in the initial decision of the trial examiner". The initial decision of the trial examiner therefore never become final and never became the decision of the Commission. It is not before this Court on review except to the extent referred to in note 3, (supra, p. 8).

In his statement of points relied on (R. 101-104) petitioner sets forth four points upon which he intends to rely. All of these relate solely to the question of whether the findings of fact made by the Commission, its conclusion and the order to cease and desist based thereon are supported by substantial evidence. However, in his brief (p. 5) petitioner advises the Court that he "does not take exception to the findings of fact" made by the Commission, and, further than this, in his brief petitioner does not argue that any finding of fact made by the Commission is not supported by substantial evidence. It would seem, therefore, that petitioner has abandoned the alleged errors specified in his petition to review. *Donnelley* v. *United States,* 276 U.S. 505, 511 (1928).

Petitioner admits (Br. p. 1) that in the operation of his collection agency he uses misleading post cards (see Comm. Exs. 1A-1B, 2A-2B) for the purpose of obtaining information, necessary in the conduct of his collection agency, which otherwise he would not be able to ob-

tain. He contends (Br. p. 2) that since he does not sell or use these post cards in interstate commerce but confines their use strictly to his business and for his own benefit their misleading qualities are of no consequence. He admits, however (Br. p. 2), that if his business is in interstate commerce the Commission has jurisdiction to enter the order to cease and desist.

Petitioner says (Br. p. 3) that he is here seeking to have the Court set aside "the cease and desist order issued by the Commission on December 22, 1950". Petitioner here appears to be confused. As we have stated (supra, p. 9) the Commission did not enter any cease and desist order in this matter on December 22, 1950. It was on that date that the trial examiner handed down his initial decision. This decision never became final and never became the decision of the Commission for the reason that petitioner appealed therefrom (supra, p. 9).

Petitioner states (Br. p. 3) that he is here seeking to have set aside "that portion of the order issued July 9, 1951 denying in part his appeal from the initial decision of the trial examiner". This, as we have heretofore indicated, was an interlocutory decision of the Commission wherein the Commission denied that portion of petitioner's appeal that excepted to the trial examiner's finding that petitioner's business was in interstate commerce. This decision of the Commission is not reviewable under the Federal Trade Commission Act except to the extent as stated in note 3 (supra, p. 8).

On page 5 of his brief petitioner tells the Court that he does not question *any* finding of fact made by the

Commission.[5] He does, however, challenge the conclusion of the Commission that his admitted misleading acts and practices constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Petitioner states (Br. p. 7) that he challenges the findings of fact made by the Commission in its decision on his appeal from the trial examiner's initial decision and also challenges the cease and desist order based on "said findings". The reason for this challenge says petitioner is that the findings made by the Commission in this decision "states facts not within the record of the trial examiner and deliberately omits" petitioner's testimony on his method of obtaining business. Here again petitioner shows confusion. This is in reality a challenge of the findings of fact made by the trial examiner. The Commission made no findings as to the facts, as that term is understood and used in the Federal Trade Commission Act, in its decision on petitioner's appeal; and, the Commission issued no order based upon any alleged findings of fact made in such decision. The findings of the trial examiner never became final. The cease and desist order entered by the Commission in this matter is not predicated upon any findings of fact made by the trial examiner. The order here is based upon the findings of fact and the conclusion contained in the Commission's ultimate and final determination of this matter on its merits.

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[5] All of the findings of fact of the Commission are contained in Paragraphs One through Six of the Commission's final decision handed down on July 9, 1951 (R. 38-42).

Petitioner then (Br. p. 8) states the issues as: (1) "Are the findings of the Commission in the order sustaining in part and denying in part [petitioner's] appeal from the initial decision of the trial examiner supported by the evidence" and (2) Does the Commission have authority or jurisdiction to enter the order to cease and desist?". He then specifies the error as "The findings and conclusion of the Commission hereinbefore referred to are erroneous". The reason for this, according to petitioner, being that there is no evidence in the record to show that he solicits for collection accounts from business and professional individuals, partnerships and corporations located in states other than the State of California. Here again apparently petitioner is referring to the Commission's decision (R. 34-36) on his appeal from the initial decision of the trial examiner (R. 26-32) and not to the findings as to the facts and conclusion (R. 37-42) made by the Commission on the merits. The decision of the Commission on petitioner's appeal is not a finding of fact as we have hereinabove indicated (supra, p.). The Commission made no finding whatever on solicitation, method of solicitation, or person solicited.

On page 9 of his brief under the heading "Argument" petitioner says "The Commission's findings are not supported by substantial evidence". This statement contradicts a prior statement made in his brief (p. 5) that he does not question any finding of fact made by the Commission.

In view of the confusion, inconsistencies and contradictions appearing in petitioner's brief; and, taking into consideration admissions made by petitioner in his

answer (R. 13), stipulation (R. 71-72), and brief (p. 5, 9); and, giving full weight and accord to that portion of his answer in which petitioner denied that his business is in interstate commerce, we believe that in his petition to review, points relied on and in his brief petitioner only intended to raise and actually present to this Court the issue of interstate commerce—even though he does not do so.

Therefore, if there is any question before this Court, we believe it can be stated as follows:

> Whether petitioner's acts and practices, admitted by him to be misleading and found by the Commission to be unfair and deceptive, occurred in interstate commerce.

III

ARGUMENT

Petitioner's Acts and Practices, Admitted by Him to be Misleading and Found by the Commission to be Unfair and Deceptive, Occurred in Interstate Commerce

Except in so far as petitioner attempts to question the Commission's conclusion that his admitted misleading acts and practices occurred in interstate commerce, there is no dispute as to the facts. The applicable law is well settled. The Commission's findings as to the facts if supported by substantial evidence are conclusive. The statute so provides, 52 Stat. 113; 15 U.S.C. 45(c), this Court has often so held,[6] and petitioner so admits (Br. p. 9).

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[6] *Jack Silverman, etc.* v. *Federal Trade Commission*, 145 F. 2d 751, . (C. A. 9, 1944); *Stanley Laboratories* v. *Federal Trade Commission*, 138 F. 2d 388, 393 (C. A. 9, 1943); *American Medicinal Products* v. *Federal Trade Commission*, 136 F. 2d 426, 427 (C. A. 9, 1943). Also see *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 63 (1927).

The uncontradicted facts upon which the Commission based its findings as to the facts, its conclusion and issued the order are set out in our brief summary of the facts (supra, pp. 3-7). Briefly they are that petitioner conducts a collection agency with his principal office located in Los Angeles, California. His clients reside in states other than California and the accounts for collection are against debtors similarly located. He secures his business through the United States mails. He receives money from debtors located in states other than the State of California and transmits money to creditors similarly located; he also received money from creditors representing his commission on debts paid direct to the creditor. These creditors reside in states other than the State of California.

The record is uncontradicted that petitioner made use of the United States mail to obtain information from debtors in an attempt to collect money due his clients; that the postal cards used for this purpose were false and misleading in the manner found by the Commission. On the very first page of his brief petitioner tells the Court that he has not at any time ever contended that the postal cards used by him in interstate commerce were not deceptive or misleading. He admits that they were.

We therefore respectfully submit that in view of the uncontradicted evidence established by the Record the Commission could have made no other finding of fact, arrived at no other conclusion and the order to cease and desist was properly entered.

Under the heading "Argument" (Br. p. 9) petitioner admits that the findings of the Commission are

conclusive if supported by substantial evidence. He says he must demonstrate to the Court that the findings are not so supported. Then under the statement "Findings of the Commission are not supported by the record"[7] petitioner states to the Court, without any citation to the record, that "The record clearly shows that independent contractors solicit the accounts in the various states and thereafter within the State of California sell such accounts to [him] for $1 per name * * *"; and that the record shows that he corresponds with creditors in various states "to verify the assignment of the accounts * * * and to remit collections when made". This portion of petitioner's brief is similar to those portions hereinabove discussed. It is not only contradictory on its face but it is not completely accurate. Further and more important than this, it contradicts petitioner's sworn testimony on this subject.

Petitioner testified that he secures business in two ways: (1) by listings in recognized license books and (2) "We solicit by personal contact, men in the field" (R. 47). He said that the solicitors (independent contractors) were paid on the basis of a certain rate depending on the type of account secured (R. 49); that the creditors from whom he secures business are located within and without the State of California and that his business is against debtors similarly located (R. 50-51).

Petitioner further testified that he insists upon an assignment from the creditor of every account secured for collection (R. 65). When asked if he purchased the accounts, petitioner replied: "No, Sir, they are as-

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[7] This contradicts petitioner's admission (Br. p. 5) that he does not question any finding of fact made by the Commission.

signed to us for the purpose of collection and our fees are specified in the written assignment''. He further stated: "We do not buy any accounts. I am not licensed, in fact, to buy accounts. We take them on a so-called assignment basis * * *''. He stated that Commission's Exhibit 7A is a written power of attorney to represent the creditor (R. 72-73).

In the face of the sworn testimony of petitioner it is exceedingly difficult to understand how petitioner can now tell this Court that he purchases the accounts from independent contractors.

Further than this the statement as to how he secured accounts for collection is contradictory on its face. In one breath petitioner says he purchases the accounts and in the next he says he remits collections when made to creditors in the various states. If petitioner purchased the accounts they became his property and there would be no occasion to remit collections to anyone; nor would there be any occasion of corresponding with any creditor in reference thereto.

But even though petitioner's statement in this respect is true, it is of no consequence. The manner in which petitioner secured accounts for collection is neither material nor important here. There was no allegation in the complaint that petitioner's method of securing business was either unfair or deceptive. In fact, the complaint made no reference to petitioner's method of securing business. It was not an issue. The Commission therefore made no finding of any nature in reference thereto. It would therefore seem that petitioner is here complaining of a lack of finding rather than a finding not supported by evidence.

Petitioner then goes on to say that the conclusion of the Commission that his business is in interstate commerce is based "solely upon the fact that [he] uses the mail to communicate with creditors, debtors and to transport cards". He admits that such correspondence is in interstate commerce. However, relying on *United States Fidelity* v. *Commonwealth,* 129 S.W. 314 and *State* v. *Morgan,* 14 N.W. 314, petitioner seems to argue, or at least take the position, that his business is not in interstate commerce but is subject to state regulation. There is no merit to this and the authorities relied upon are not in point.

The *Fidelity* case and the *Morgan* case involved state revenue statutes and the question presented was whether persons doing business in the state and sending credit reports to persons outside of the state were subject to a state license tax. The Court held that such persons could not escape such license tax by hiding behind the shield of interstate commerce. Apparently taking great comfort from these state decisions, one handed down in 1891 and the other in 1910, ignoring the long line of decisions of the Supreme Court of the United States and of the various United States Courts of Appeals on interstate commerce,[8] petitioner seems to attempt to say that the decisions in the *Fidelity* and *Morgan* cases overturn all Federal court decisions on interstate commerce, is controlling and binding in the instant case and, therefore, the Federal Trade Commission and this Court is without jurisdiction. Could any-

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[8] *International Textbook Co.* v. *Pigg,* 217 U. S. 91 (1910); *Furst* v. *Brewster,* 282 U. S. 493 (1931) and many others. Also See *Hills Bros.* v. *Federal Trade Commission,* 9 F. 2d 481, 484 (C. A. 9, 1926).

thing be more astounding? The decision of the state court on questions raised under state revenue-producing statutes is a far cry from the jurisdiction of the Federal Trade Commission and a United States Court of Appeals under the provisions of the Federal Trade Commission Act.

The remaining portion of petitioner's brief is of like quality. It is a brain child of petitioner's confused thinking and inaccurate reasoning.

We believe that we have answered petitioner's brief at much greater length than it deserved. There is no merit to any of it. He obviously has abandoned completely all of the points raised and set forth in his petition to review, has argued new matters wholly irrelevant and factual matters not encompassed by the issues raised by the pleadings or in the findings made by the Commission.

IV

CONCLUSION

It is therefore respectfully submitted that the Commission's findings as to the facts and its conclusion that the acts and practices so found are unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act, is amply, wholly and completely supported by the record and that the order to cease and desist was properly issued. *Jack Silverman, etc.* v. *Federal Trade Commission,* 145 F. 2d 751 (C.A. 9, 1944).

The Commission, therefore, prays (1) that petitioner's brief be stricken; (2) the petition to review be dis-

missed; and (3) pursuant to the statute[9] the Court enter its decree affirming the Commission's order and commanding petitioner to obey and comply therewith.

Respectfully submitted,

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Washington, D. C.
April 7, 1952.

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[9] "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Sec. 5(c), 52 Stat. 113; 15 U. S. C. A. Sec. 45(c).

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